IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
May 23, 2002 Session

STATE OF TENNESSEE v. DIONTE TAUREAN WHITE

A Direct Appeal from the Circuit Court for Henry County
No. 13117 The Honorable Julian P. Guinn, Judge

No. W2001-01076-COA-R3-CV - Filed July 18, 2002

This is an appeal of a juvenile proceeding tried before a jury in criminal court on appeal *de novo* from juvenile court. The juvenile was found guilty of committing delinquent acts in violation of T.C.A. § 39-17-417 (Supp. 2001) and T.C.A. § 39-17-423 (1997). Judgment was entered on the jury verdict, and the juvenile appeals. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY KIRBY LILLARD, J., joined.

Victoria L. Dibonaventura, Paris, For Appellant, Dionte Taurean White

Paul G. Summers, Attorney General & Reporter, Braden H. Boucek, Assistant Attorney General, For Appellee, State of Tennessee

OPINION

Since the defendant has not questioned the sufficiency of the evidence to sustain the jury's verdict, we will not prolong the Opinion with a detailed factual review. Suffice it to say that an undercover officer working with the Paris, Tennessee Police Department on one occasion purchased crack cocaine from the defendant, and on another occasion, purchased what was represented by defendant to be crack cocaine, but was, in reality, ground-up Dial soap. Defendant was charged with committing delinquent acts including the sale of a controlled substance and the sale of a counterfeit controlled substance in violation of the statutes which we quote in pertinent part:

> **39-17-417. Criminal offenses and penalties.** - (a) It is an offense for a defendant to knowingly:
>
> * * *

(3) Sell a controlled substance; . . . .

39-17-423. Counterfeit controlled substances. - (a) It is an offense for a person to:

(1) Sell;

(2) Deliver; or

(3) Distribute a substance which is represented to be a controlled substance and which is substantially similar in color, shape, size, and markings or lack thereof, to a Schedule I, II, III or IV controlled substance as classified in § § 39-17-406 - 39-17-412, in order that the substance may be sold as a controlled substance.

* * *

The juvenile court found the defendant guilty of the delinquent acts, and the defendant appealed to the Henry County Circuit Court for a trial *de novo* and demanded a jury. At trial, the jury found the defendant guilty of the alleged delinquent acts, and judgment was entered on the jury verdict. The trial court remanded the case to the juvenile court for enforcement of the judgment pursuant to T.C.A. § 37-1-159 (c) (2001), and defendant's motion for a new trial was overruled. Defendant appeals, presenting the following three issues for review, as stated in his brief:

1. Whether the trial court erred in not granting the Defendant's Motion to Dismiss the Sale of a Counterfeit Substance count after sufficient evidence was presented that the substance was Dial soap and Dial soap entered into the stream of commerce before crack cocaine entered into the stream of commerce and where the State was alleging the Defendant sold the substance purporting it to be crack cocaine and whether the trial court erred in not granting the Defendant's Motion to Dismiss the Sale of Counterfeit Substance after evidence was submitted that the buyers of the counterfeit substance had no intent to sell the substance even if it had been a controlled substance[1];

2. Whether the trial court erred in not honoring the request of defense counsel to put the VCR and television in the deliberation room with

[1]Defendant's first issue is divided into two parts. During oral arugment on May 23, 2002, defendant waived the second part of the issue concerning intent to sell. Therefore, we will only address the portion of the first issue concerning stream of commerce.

> the jury at the same time the evidence, including the videos introduced into evidence, went into the jury room;
>
> 3. Whether the trial court erred in instructing the jury that the jury need not concern itself with punishment in this cause for by law the case would be remanded back to the juvenile court for disposition rather than to have instructed the jury that it need not concern itself with punishment in this case because under Tennessee law that would be determined by a court at a later date.

Defendant argues in his brief that because Dial soap entered into the stream of commerce prior to crack cocaine, then according to T.C.A. § 39-17-423(e)(3), defendant's sale of a counterfeit controlled substance charge should be dismissed. We disagree. The statute in question provides:

> (a) It is an offense for a person to:
>
> (1) Sell;
>
> (2) Deliver; or
>
> (3) Distribute a substance which is represented to be a controlled substance and which is substantially similar in color, shape, size, and markings or lack thereof, to a Schedule I, II, III or IV controlled substance as classified in §§ 39-17-406 -- 39-17-412, in order that the substance may be sold as a controlled substance.
>
> (b) It is an offense for a person to manufacture for sale or exchange any substance with the intent that such substance substantially imitate in color, shape, size, and markings or lack thereof, the physical appearance of a Schedule I, II, III, or IV controlled substance, as classified in §§ 39-17-406 -- 39-17-412, in order that the substance may be sold as a controlled substance.
>
> (c) A violation of subsection (a) or (b) is a Class E felony.
>
> (d) It is an offense for a person to be the recipient of a sale or exchange of a substance set forth in this section. A violation of this subsection is a Class A misdemeanor. In addition to the penalties set forth in this section, the court may impose a mandatory drug rehabilitation program.
>
> (e) The provisions of this section shall not apply to:

> (1) Any person who manufactures or sells a substance for use as a placebo by a licensed physician, dentist, pharmacist or registered nurse acting under the direction of such a physician, dentist, or pharmacist;
>
> (2) A licensed physician, dentist, pharmacist or registered nurse who sells, dispenses, administers or otherwise distributes a placebo to a patient of such physician or dentist for purposes of the medical care or treatment of such patient;
>
> (3) A noncontrolled substance that was introduced into commerce prior to the introduction into commerce of the controlled substance which it is alleged to imitate;
>
> (4) A substance which may be legally purchased at a drug or grocery store without a prescription; provided, that such substance is not represented by the seller to be a controlled substance; and
>
> (5) A substance that is packaged and labeled in accordance with appropriate rules and regulations of the United States food and drug administration shall create a rebuttable presumption that the manufacturer or wholesaler of such substance is exempted from the provisions of this section.

T.C.A. § 39-17-423 (2001).

The rule of statutory construction to which all others must yield is that the intention of the legislature must prevail. ***Mangrum v. Owens***, 917 S.W.2d 244, 246 (Tenn. Ct. App. 1995)(citing ***Plough, Inc. v. Premier Pneumatics, Inc.***, 660 S.W.2d 495, 498 (Tenn. Ct. App. 1983); ***City of Humboldt v. Morris***, 579 S.W.2d 860, 863 (Tenn. Ct. App. 1978)). "[L]egislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire statute, without any forced or subtle construction to limit or extend the import of the language." ***Id***. (citing ***Worrall v. Kroger Co.***, 545 S.W.2d 736, 738 (Tenn. 1977)). The Court has a duty to construe a statute so that no part will be inoperative, superfluous, void or insignificant. The Court must give effect to every word, phrase, clause, and sentence of the act in order to achieve the Legislature's intent, and it must construe a statute so that no section will destroy another. ***Id***. (citing ***City of Caryville v. Campbell County***, 660 S.W.2d 510, 512 (Tenn. Ct. App. 1983); ***Tidwell v. Collins***, 522 S.W.2d 674, 676 (Tenn. 1975)).

Defendant's interpretation conflicts with sub-section (a), which explicitly provides for the offense of selling, delivery, or distributing counterfeit controlled substances. Reading the statute as a whole, we believe the legislature intended by subsection (e)(3) to prevent a prosecution for selling a substance representing it to be a substance which in itself had not been designated a controlled

substance at the very time of the selling and representation. As the State correctly points out, nearly all prosecutions for the sale of a counterfeit controlled substance would be impossible under White's interpretation of the statute. Therefore, we find that the trial court correctly overruled defendant's motion to dismiss the sale of a counterfeit controlled substance count.

In defendant's second issue, he asserts that the trial court erred in denying his counsel's request to put the VCR and television in the jury room in order to allow the jury to view videotapes introduced as exhibits. The State argues that the defendant waived any alleged error in this regard because there is nothing in the record to indicate defendant moved or requested the court to send the equipment to the jury room. Defendant concedes that the record is silent on this point but asserts that there was a request made and denied by the court, and that the trial court's comment on the motion for a new trial that "we covered this motion before" confirms the previous request. While we agree with the State that the record is silent as to defendant's request and that the trial court's comment probably does not cure the deficiency, we will address the merits of the issue.

The record reflects that the trial court sent all of the exhibits to the jury room, and the jury was explicitly instructed to consider all of the evidence. The jury was shown the exhibits at the trial, including the viewing of the videotapes, and it is readily apparent that if the jury wanted to refresh its memory concerning the material on the videotapes, a request to the court would have been made. It is presumed that the jury follows the instructions of the trial court as a whole, and there is nothing in the record in this case to dispel this presumption. ***See Perkins v. Sadler***, 826 S.W.2d 439, 443 (Tenn. Ct. App. 1991). We have no Tennessee case dealing directly with the precise issue before us, but the Alabama Court of Civil Appeals in ***Oates v. State DOT***, No. 2010058, 2002 Ala. Civ. App. LEXIS 327, at *6 (Ala. Civ. App. April 26, 2002), dealing with this issue, said:

> Historically, our supreme court has upheld the use of visual aids to assist the jury in reaching its decision. ***See Southern Energy Homes, Inc. v. Washington***, 774 So. 2d 505, 515 (Ala. 2000). In condemnation cases, § 18-1A-191, Ala. Code 1975, provides an opportunity for jurors personally to view the subject property. Instead of taking the jury to the site, the Oateses properly introduced a videotape of the property before it was condemned by DOT and altered. When the jury retired to deliberate, a videotape player and a television were not provided for them. Off the record, the trial court stated that this equipment would be provided upon request by the jury. The Oateses cite no authority, and we could find none, requiring a trial court to provide such equipment during a jury's deliberations. Therefore, we conclude that the trial court did not err in failing to provide that equipment solely at the request of the Oates and in the absence of a request to do so by the jury.

While the better practice might have been to send the VCR and television to the jury room with the videotapes that had been introduced into evidence, in the absence of a request by the jury we cannot say that it is error for the trial court not to send the equipment to the jury room.

In his last issue, defendant asserts that the trial court erred in instructing the jury as follows:

> Should you find the defendant guilty of any offense, you will not concern yourself with punishment, since the defendant will be remanded to the Juvenile Court for disposition.
>
> * * *
>
> As you were earlier instructed, you will not concern yourself with punishment should you find the defendant guilty of any offense, since the court is required by law to remand this case to the Juvenile Court of this County for final disposition.

The State argues that defendant has waived this issue concerning the trial court's jury charge because defendant's counsel failed to object to the instruction. We disagree and point out that both Tenn. R. Civ. P. 51.02 (2001) and Tenn. R. Crim. P. 30(b) (2001) provide:

> After the jury has instructed the jury, the parties shall be given opportunity to object, out of hearing of the jury, to the content of an instruction given or to the failure to give a requested instruction, *but failure to make objection shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for a new trial.*

Id. (emphasis added); ***see also Grandstaff v. Hawks***, 36 S.W.3d 482, 489 (Tenn. Ct. App. 2000); ***State v. Lynn***, 924 S.W.2d 892, 898 (Tenn. 1996). Defendant raised the issue concerning the jury instruction in his motion for a new trial, and we will address this issue on the merits.

The standard for an appellate court's review of a trial judge's jury charge was stated in ***City of Johnson City v. Outdoor West, Inc.***, 947 S.W.2d 855 (Tenn. Ct. App. 1996):

> We review the jury charge in its entirety to determine whether the trial judge committed reversible error. ***Otis v. Cambridge Mut. Fire Ins. Co.,*** 850 S.W.2d 439, 446 (Tenn. 1992); ***In re Estate of Elam***, 738 S.W.2d 169, 174 (Tenn. 1987); and ***Grissom v. Metropolitan Gov't of Nashville,*** 817 S.W.2d 679, 685 (Tenn. Ct. App. 1991). Jury instructions are not measured against the standard of perfection. ***Grissom***, 817 S.W.2d at 685. The charge will not be invalidated if it "fairly defines the legal issues involved in the case and does not mislead the jury." ***Otis***, 850 S.W.2d at 446; ***Grissom***, 817 S.W.2d at

> 685. Furthermore, a particular instruction must be considered in the context of the entire charge. ***Elam***, 738 S.W.2d at 174.

Id. at 858.

It is mandated by statute that the criminal or circuit court in juvenile appeals shall remand the case to the juvenile court for enforcement of any judgment rendered. T.C.A. § 37-1-159(a) (2001).

Defendant's counsel concedes that the instruction is correct, but suggests that the instruction might lead the jury to believe that the defendant would receive no punishment. We fail to see how counsel reached such a conclusion, but in any event, counsel's speculation is immaterial. The trial court gave a full, fair and complete charge to the jury, and this issue is without merit.

Accordingly, the judgment of the trial court is affirmed. Costs of the appeal are assessed against the appellant, Dionte Taurean White, and his surety.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.